

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

ERIN WILSON,

Plaintiff,

v.

CAROLYN W. COLVIN, Commissioner
of Social Security,

Defendant.

NO: CV-11-3116-RMP

ORDER GRANTING
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT

BEFORE THE COURT are cross-motions for summary judgment, ECF
Nos. 12, 18. The Court has reviewed the motions, the memoranda in support,
Plaintiff's reply memorandum, the administrative record, and is fully informed.

JURISDICTION

Plaintiff Erin Wilson protectively filed for Supplemental Security Income
("SSI") on April 17, 2008. (Tr. 21.) Plaintiff alleged an onset date of April 24,
2007. (Tr. 21, 135.) Benefits were denied initially and again on reconsideration.
On December 5, 2008, Plaintiff timely requested a hearing before an administrative

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT ~

1 law judge (“ALJ”). (Tr. 95-97.) A hearing was held before ALJ Marie Palachuk
2 on June 16, 2010. (Tr. 42.) Plaintiff was represented by counsel. (Tr. 40-79.)
3 Testimony was taken by Dr. Thomas McKnight, a psychiatric expert, Dr. Anthony
4 Francis, a medical expert, Erin Wilson, the claimant, and Sharon Welter, a
5 vocational expert. (Tr. 39.) On May 9, 2011, ALJ Palachuk issued a decision
6 finding Plaintiff not disabled. (Tr. 21-32.) The Appeals Council denied review.
7 (Tr. 1-3.) This matter is properly before this Court under 42 U.S.C. § 405(g).

8 **STATEMENT OF THE CASE**

9 The facts of this case are set forth in the administrative hearing transcripts
10 and record and will only be summarized here. The claimant was twenty-seven
11 years old when she applied for benefits and was twenty-nine years old when ALJ
12 Palachuk issued her decision. The claimant currently is unemployed and lives with
13 her grandmother and daughter. (Tr. 61.) The claimant has not worked regularly
14 since 2007. She describes myriad conditions that keep her from finding
15 employment, including neck, shoulder, and right arm pain; migraine headaches;
16 anxiety; and depression.

17 **STANDARD OF REVIEW**

18 Congress has provided a limited scope of judicial review of a
19 Commissioner’s decision. 42 U.S.C. § 405(g). A court must uphold the
20 Commissioner’s decision, made through an ALJ, when the determination is not

1 based on legal error and is supported by substantial evidence. *See Jones v.*
2 *Heckler*, 760 F.2d 993, 995 (9th Cir. 1985) (citing 42 U.S.C. § 405(g)). “The
3 [Commissioner’s] determination that a claimant is not disabled will be upheld if
4 the findings of fact are supported by substantial evidence.” *Delgado v. Heckler*,
5 722 F.2d 570, 572 (9th Cir. 1983) (citing 42 U.S.C. § 405(g)). Substantial
6 evidence is more than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d 1112,
7 1119 n.10 (9th Cir. 1975), but less than a preponderance. *McCallister v. Sullivan*,
8 888 F.2d 599, 601-02 (9th Cir. 1989) (citing *Desrosiers v. Secretary of Health and*
9 *Human Services*, 846 F.2d 573, 576 (9th Cir. 1988)). Substantial evidence “means
10 such evidence as a reasonable mind might accept as adequate to support a
11 conclusion.” *Richardson v. Perales*, 402 U.S. 389, 401 (1971) (citations omitted).
12 “[S]uch inferences and conclusions as the [Commissioner] may reasonably draw
13 from the evidence” will also be upheld. *Mark v. Celebrezze*, 348 F.2d 289, 293
14 (9th Cir. 1965). On review, the court considers the record as a whole, not just the
15 evidence supporting the decisions of the Commissioner. *Weetman v. Sullivan*, 877
16 F.2d 20, 22 (9th Cir. 1989) (quoting *Kornock v. Harris*, 648 F.2d 525, 526 (9th Cir.
17 1980)).

18 It is the role of the trier of fact, not this court, to resolve conflicts in
19 evidence. *Richardson*, 402 U.S. at 400. If evidence supports more than one
20 rational interpretation, the court may not substitute its judgment for that of the

1 Commissioner. *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579
2 (9th Cir. 1984). Nevertheless, a decision supported by substantial evidence will
3 still be set aside if the proper legal standards were not applied in weighing the
4 evidence and making a decision. *Browner v. Sec’y of Health and Human Services*,
5 839 F.2d 432, 433 (9th Cir. 1988). Thus, if there is substantial evidence to support
6 the administrative findings, or if there is conflicting evidence that will support a
7 finding of either disability or nondisability, the finding of the Commissioner is
8 conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-30 (9th Cir. 1987).

9 SEQUENTIAL PROCESS

10 The Social Security Act (the “Act”) defines “disability” as the “inability to
11 engage in any substantial gainful activity by reason of any medically determinable
12 physical or mental impairment which can be expected to result in death or which
13 has lasted or can be expected to last for a continuous period of not less than 12
14 months.” 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The Act also provides that a
15 Plaintiff shall be determined to be under a disability only if his or her impairments
16 are of such severity that Plaintiff is not only unable to do his or her previous work
17 but cannot, considering Plaintiff’s age, education and work experiences, engage in
18 any other substantial gainful work which exists in the national economy. 42
19 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B). Thus, the definition of disability consists

1 of both medical and vocational components. *Edlund v. Massanari*, 253 F.3d 1152,
2 1156 (9th Cir. 2001).

3 The Commissioner has established a five-step sequential evaluation process
4 for determining whether a claimant is disabled. 20 C.F.R. § 416.920. Step one
5 determines if he or she is engaged in substantial gainful activities. If the claimant
6 is engaged in substantial gainful activities, benefits are denied. 20 C.F.R. §§
7 404.1520(a)(4)(i), 416.920(a)(4)(i).

8 If the claimant is not engaged in substantial gainful activities, the decision
9 maker proceeds to step two and determines whether the claimant has a medically
10 severe impairment or combination of impairments. 20 C.F.R.

11 §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii). If the claimant does not have a severe
12 impairment or combination of impairments, the disability claim is denied.

13 If the impairment is severe, the evaluation proceeds to the third step, which
14 compares the claimant's impairment with a number of listed impairments
15 acknowledged by the Commissioner to be so severe as to preclude substantial
16 gainful activity. 20 C.F.R. §§ 404.1520(a)(4)(iii), 416.920(a)(4)(iii); *see also* 20
17 C.F.R. § 404, Subpt. P, App. 1. If the impairment meets or equals one of the listed
18 impairments, the claimant is conclusively presumed to be disabled.

19 If the impairment is not one conclusively presumed to be disabling, the
20 evaluation proceeds to the fourth step, which determines whether the impairment

1 prevents the claimant from performing work he or she has performed in the past.

2 If the plaintiff is able to perform his or her previous work, the claimant is not
3 disabled. 20 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv). At this step, the
4 claimant's residual functional capacity ("RFC") assessment is considered.

5 If the claimant cannot perform this work, the fifth and final step in the
6 process determines whether the claimant is able to perform other work in the
7 national economy in view of his or her residual functional capacity and age,
8 education and past work experience. 20 C.F.R. §§ 404.1520(a)(4)(v),
9 416.920(a)(4)(v); *Bowen v. Yuckert*, 482 U.S. 137 (1987).

10 The initial burden of proof rests upon the claimant to establish a prima facie
11 case of entitlement to disability benefits. *Rhinehart v. Finch*, 438 F.2d 920, 921
12 (9th Cir. 1971); *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999). The initial
13 burden is met once the claimant establishes that a physical or mental impairment
14 prevents him from engaging in his or her previous occupation. The burden then
15 shifts, at step five, to the Commissioner to show that (1) the claimant can perform
16 other substantial gainful activity, and (2) a "significant number of jobs exist in the
17 national economy" which the claimant can perform. *Kail v. Heckler*, 722 F.2d
18 1496, 1498 (9th Cir. 1984).

ALJ'S FINDINGS

At step one of the five-step sequential evaluation process, the ALJ found that Plaintiff has not engage in substantial gainful activity since April 17, 2008, the alleged date of onset. (Tr. 23.) At step two, the ALJ found that Plaintiff has the following severe impairments: "remote history of distraction injury to right arm, status post right shoulder surgery; migraine headaches; and degenerative disc disease of the cervical spine." (Tr. 23.) The ALJ found that none of Plaintiff's impairments, taken alone or in combination, met or medically equaled any of the impairments listed in Part 404, Subpart P, Appendix 1 of 20 C.F.R. (Tr. 24.) The ALJ found that the claimant, with some exceptions, could perform less than a full range of light work. (Tr. 24.) As a result, the ALJ found at step four that Plaintiff could perform past relevant work as a sales clerk and cleaner/housekeeper. (Tr. 28.) Accordingly, the ALJ found that Plaintiff was not under a disability for purposes of the Act. (Tr. 28.)

ISSUES

The question before the Court is whether the ALJ's decision is supported by substantial evidence and free of legal error. Ms. Wilson argues that the ALJ erred in six ways: (1) by failing to find that Ms. Wilson suffered the severe impairments of anxiety, depression, and diagnosed back, hip and other complaints; (2) by failing to fully and fairly develop the record; (3) by improperly rejecting the opinions of

1 the claimant's treating medical providers; (4) by improperly rejecting the
2 claimant's subjective complaints; (5) by presuming that Ms. Wilson's past work
3 constituted past relevant work; and (6) by posing a hypothetical to the vocational
4 expert that did not accurately reflect Ms. Wilson's limitations.

5 DISCUSSION

6 Finding of Severe Impairment at Step Two

7 Step two requires an ALJ to determine whether the claimant has a medically
8 severe impairment or combination of impairments. §§ 404.1520(a)(4)(ii),
9 416.920(a)(4)(ii). To satisfy step two's requirement, the claimant must prove the
10 existence of a physical or mental impairment by providing medical evidence
11 consisting of signs, symptoms, and laboratory findings; the claimant's own
12 statement of symptoms alone will not suffice. 20 C.F.R. §§ 404.1508, 416.908.
13 Only "acceptable medical sources" can supply the evidence needed to establish the
14 existence of an impairment. 20 C.F.R. §§ 404.1513(a), 416.913(a). Acceptable
15 medical sources include licensed physicians and licensed or certified psychologist.
16 §§ 404.1513(a)(1)-(2), 416.913(a)(1)-(2).

17 At step two, the ALJ must also look to the severity of any impairment.
18 §§ 404.1520(c), 416.920(c). The severity inquiry at step two is "'a de minimis
19 screen device [used] to dispose of groundless claims.'" *Webb v. Barnhart*, 433
20 F.3d 683, 687 (9th Cir. 2005) (alteration in original) (quoting *Smolen v. Chater*, 80

1 F.3d 1273, 1290 (9th Cir. 1996)). Accordingly, an impairment is ““not severe *only*
2 *if* the evidence establishes a slight abnormality that has no more than a minimal
3 effect on an individual’s ability to work.’” *Webb*, 433 F.3d at 686 (quoting
4 *Smolen*, 80 F.3d at 1290).

5 At step two, the ALJ found that Ms. Wilson suffered from remote history of
6 distraction injury to her right arm that was post shoulder surgery, migraine
7 headaches, and degenerative disc disease. The claimant argues that the ALJ erred
8 in rejecting Ms. Wilson’s arguments that she also suffers from anxiety, depression,
9 and other physical ailments.

10 The record is devoid of a diagnosis of depression by an acceptable medical
11 source. Ms. Wilson points to two pages in the record that appear to assert a
12 psychiatric history of “anxiety and depression” and state that the claimant is
13 currently undergoing treatment. (Tr. 395, 407.) However, the records are
14 emergency room visits that record Ms. Wilson’s self-reported history of depression
15 and anxiety. The first record involves an emergency room visit with complaints of
16 should pain (Tr. 395), and the second record involves an emergency room visit
17 with complaints of foot pain, (Tr. 407.) Neither visit has anything to do with a
18 mental health diagnosis. (Tr. 395, 407). As other records make clear, Ms. Wilson
19 is self-diagnosed as depressed and suffering anxiety. (Tr. 527.) Because there is
20 no evidence that Ms. Wilson has been diagnosed by an acceptable medical source

1 as depressed or suffering an anxiety disorder, the ALJ did not err in rejecting her
2 claims at step two. SSR 06-03p.

3 Ms. Wilson further argues, without elaboration, that the ALJ erred by failing
4 to find severe impairments in the form of spondylosis, occipital neuralgia,
5 trigeminal neuralgia, and back and hip impairments. While the record does
6 evidence complaints of back pain and hip pain (Tr. 237-38), nothing in the record
7 concludes a physical basis for this ailment. The record does evidence diagnoses of
8 spondylosis, occipital neuralgia, and trigeminal neuralgia (Tr. 609, 612, 614, 616).
9 However, a review of the records establishing those diagnoses reveals that the
10 diagnoses were made to account for Ms. Wilson's complaints of neck, shoulder,
11 and head pain. As the ALJ did not end her inquiry at step two and proceeded to
12 address Ms. Wilson's complaints in the body of her decision, any failure to include
13 spondylosis or neuralgia at step two was harmless. *See Lewis v. Astrue*, 498 F.3d
14 909, 911 (9th Cir. 2007); *Burch v. Barnhart*, 400 F.3d 676, 682 (9th Cir. 2005).

15 **Development of the Record**

16 An ALJ has a duty to fully and fairly develop the record in order to protect
17 the interests of an applicant for disability benefits. *Higbee v. Sullivan*, 975 F.2d
18 558, 561-62 (9th Cir. 1992). However, "[a]n ALJ's duty to develop the record
19 further is triggered only when there is ambiguous evidence or when the record is
20 inadequate to allow for proper evaluation of the evidence." *Mayes v. Massanari*,

1 276 F.3d 453, 459-60 (9th Cir. 2001) (citing *Tonapetyan v. Halter*, 242 F.3d 1144,
2 1150 (9th Cir. 2001)).

3 Ms. Wilson's challenge focuses on the ALJ's alleged failure to address her
4 claims that she suffers from depression and anxiety. However, the only suggestion
5 in the record that Ms. Wilson suffered from those disorders comes from Ms.
6 Wilson's own statements (Tr. 201, 693), or are reports from emergency room visits
7 suggesting Ms. Wilson has a history of anxiety and depression (Tr. 395, 407).
8 Those reports do not evidence any actual diagnosis of those conditions and appear
9 to be nothing more than records of Ms. Wilson's self-reporting. Testimony at the
10 hearing supports a finding that there is no record of a mental health diagnosis. (Tr.
11 44-45.) Additionally, Ms. Wilson testified, albeit in the context of her claim to
12 post-traumatic stress disorder, that she never sought treatment for that condition
13 but diagnosed herself. (Tr. 65-66.) In short, the record unambiguously supported
14 the ALJ's conclusion that Ms. Wilson had not been diagnosed as suffering from
15 anxiety or depression.

16 Furthermore, an ALJ can meet its obligation to supplement the record when
17 it leaves the record open for further supplementation. *Tonapetyan*, 242 F.3d at
18 1150. The ALJ asked counsel for Ms. Wilson if there was further evidence to be
19 submitted at the hearing, and counsel said no. (Tr. 41.) The claimant did
20 supplement the record before the appeals council and nothing in the supplement

1 suggests a diagnosis of depression or anxiety during the relevant time period.

2 Taken altogether, the Court finds that the ALJ did not fail in her duty to fully and
3 fairly develop the record.

4 **ALJ's Weighing of Treating Medical Providers' Opinions**

5 In evaluating a disability claim, the adjudicator must consider all medical
6 evidence provided. A treating or examining physician's opinion is given more
7 weight than that of a non-examining physician. *Benecke v. Barnhart*, 379 F.3d
8 587, 592 (9th Cir. 2004). If the treating physician's opinions are not contradicted,
9 they can be rejected by the decision-maker only with clear and convincing reasons.
10 *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1996). If contradicted, the ALJ may
11 reject the opinion with specific, legitimate reasons that are supported by substantial
12 evidence. *See Flaten v. Sec'y of Health and Human Servs.*, 44 F.3d 1453, 1463
13 (9th Cir. 1995). In addition to medical reports in the record, the testimony of a
14 non-examining medical expert selected by the ALJ may be helpful in her
15 adjudication. *Andrews v. Shalala*, 53 F.3d 1035, 1041 (9th Cir. 1995) (citing
16 *Magallanes v. Bowen*, 881 F.2d 747, 753 (9th Cir. 1989)). Testimony of a medical
17 expert may serve as substantial evidence when supported by other evidence in the
18 record. *Id.*

19 Historically, the courts have recognized conflicting medical evidence, the
20 absence of regular medical treatment during the alleged period of disability, and

1 the lack of medical support for doctors' reports based substantially on a claimant's
2 subjective complaints of pain as specific, legitimate reasons for disregarding the
3 treating physician's opinion. *Flaten*, 44 F.3d at 1463-64; *Fair v. Bowen*, 885 F.2d
4 597, 604 (9th Cir 1989). The ALJ need not accept a treating source opinion that is
5 "brief, conclusory and inadequately supported by clinical finding." *Lingenfelter v.*
6 *Astrue*, 504 F.3d 1028, 1044-45 (citing *Thomas v. Barnhart*, 278 F.3d 947, 957 (9th
7 Cir. 2002)). Where an ALJ determines a treating or examining physician's stated
8 opinion is materially inconsistent with the physician's own treatment notes,
9 legitimate grounds exist for considering the purpose for which the doctor's report
10 was obtained and for rejecting the inconsistent, unsupported opinion. *Nguyen v.*
11 *Chater*, 100 F.3d 1462, 1464 (9th Cir. 1996.) "Medical opinions that predate the
12 alleged onset of disability are of limited relevance." *Carmickle v. Comm'r of Soc.*
13 *Sec. Admin.*, 533 F.3d 1155, 1165 (9th Cir. 2008); *Fair*, 885 F.2d at 600.
14 Rejection of an examining medical source opinion is specific and legitimate where
15 the medical source's opinion is not supported by his own medical records and/or
16 objective data. *Tommasetti v. Astrue*, 533 F.3d 1035, (9th Cir. 2008)

17 Ms. Wilson argues that the ALJ erred by discounting the medical opinions of
18 Dr. Raymond P. Snyder, M.D.; Dr. Joan K. Knight, M.D.; Dr. Michael Hauke,
19 M.D.; and Dr. Glyn E. Marsh, M.D. Ms. Wilson argues that Dr. Snyder diagnosed
20 Ms. Wilson as having increasing shoulder pain subsequent to her surgery. ECF

1 No. 13 at 15. However, Dr. Snyder's report was generated prior to Ms. Wilson's
2 shoulder surgery. (Tr. 379.) Additionally, Dr. Snyder's report states simply that
3 Ms. Wilson "reports increased right shoulder pain." (Tr. 379.) Accordingly, the
4 report in question is merely a recitation of Ms. Wilson's subjective complaints.

5 Ms. Wilson argues that Dr. Knight diagnosed her as suffering stress and
6 insomnia. Similarly to Dr. Snyder, however, the report makes clear that any
7 diagnosis was based on Ms. Wilson's emergency room complaints of stress and
8 insomnia. (Tr. 410.) Where a diagnosis is based solely on subjective complaints
9 by the claimant, the ALJ does not err in rejecting such a diagnosis if she makes an
10 adverse credibility determination. 20 C.F.R. § 404.1527(d). As the Court
11 ultimately upholds the ALJ's determination that Ms. Wilson's subjective
12 complaints of pain are not credible, the Court finds that the ALJ did not
13 erroneously discount the opinions of Dr. Snyder and Dr. Knight.

14 The claimant argues that ALJ Palachuk impermissibly discounted the
15 opinion of Dr. Hauke that Ms. Wilson suffered severe chronic pain. ECF No. 13 at
16 15. Dr. Hauke actually opined that Ms. Wilson had a past medical history of
17 chronic right shoulder pain and was suffering shoulder pain at the time. (Tr. 395.)
18 However, this diagnosis was prior to the claimant's surgery on her right shoulder,
19 which occurred on December 8, 2008. (Tr. 400-02.) As the ALJ's decision
20 recognizes improvement of Ms. Wilson's shoulder pain post-surgery, it is

1 consistent with Dr. Hauke's diagnosis. Therefore, the ALJ did not discount Dr.
2 Hauke's pre-surgery opinion.

3 As to Dr. Marsh's opinion, the ALJ did not address the opinion because it
4 was not provided until the case was before the appeals council. That said, even
5 where evidence is presented for the first time before the appeals council, this Court
6 should consider it when determining whether the ALJ's opinion is supported by
7 substantial evidence. *Brewes v. Comm'r of Soc. Sec. Admin.*, 682 F.3d 1157, 1163
8 (9th Cir. 2012). However, while Dr. Marsh initially concluded that Ms. Wilson
9 suffered migraine headaches that limited her to one to ten hours of work per week,
10 (Tr. 683), Dr. Marsh shortly thereafter concluded that Ms. Wilson could work up to
11 forty hours per week, (Tr. 687). Accordingly, the Court concludes that the
12 inclusion of Dr. Marsh's opinion in the record would not have changed the ALJ's
13 determination. As a result, the Court finds that the ALJ did not improperly
14 discount the testimony of Ms. Wilson's medical providers.

15 **ALJ's Credibility Determination**

16 When the ALJ finds a claimant's statements as to the severity of
17 impairments, pain, and functional limitations are not credible, the ALJ must make
18 a credibility determination with findings sufficiently specific to permit the court to
19 conclude the ALJ did not arbitrarily discredit claimant's allegations. *Thomas*, 278
20 F.3d at 958-959; *Bunnell v. Sullivan*, 947 F.2d 341, 345-46 (9th Cir. 1991) (en

1 banc). It is well-settled, however, that an ALJ cannot be required to believe every
2 allegation of disabling pain, even when medical evidence exists that a claimant's
3 condition may produce pain. "Many medical conditions produce pain not severe
4 enough to preclude gainful employment." *Fair v. Bowen*, 885 F.2d 597, 603(9th
5 Cir. 1989). Although an adjudicator may not reject a claimant's extreme symptom
6 complaints solely on a lack of objective medical evidence, medical evidence is a
7 relevant factor to consider. SSR 96-7p.

8 If there is no affirmative evidence that the claimant is malingering, the ALJ
9 must provide "clear and convincing" reasons for rejecting the claimant's symptom
10 testimony. *Reddick v. Chater*, 157 F.3d 715, 722 (9th Cir. 1998). The ALJ
11 engages in a two-step analysis in deciding whether to admit a claimant's subjective
12 symptom testimony. *Lingenfelter v. Astrue*, 504 F.3d 1028, 1035-36 (9th Cir.
13 2007); *Smolen v. Chater*, 80 F.3d 1273, 1281 (9th Cir. 1996). Under the first step,
14 the ALJ must find the claimant has produced objective medical evidence of an
15 underlying "impairment," and that the impairment, or combination of impairments,
16 could reasonably be expected to cause "some degree of the symptom."
17 *Lingenfelter*, 504 F.3d at 1036. Once the first test is met, the ALJ must evaluate
18 the credibility of the claimant and make specific findings supported by "clear and
19 convincing" reasons. *Id.*

1 In addition to ordinary techniques of credibility evaluation, the ALJ may
2 consider the following factors when weighing the claimant's credibility: the
3 claimant's reputation for truthfulness; inconsistencies either in his allegations of
4 limitations or between his statements and conduct; daily activities and work record;
5 and testimony from physicians and third parties concerning the nature, severity,
6 and effect of the alleged symptoms. *Light v. Social Sec. Admin.*, 119 F.3d 789, 792
7 (9th Cir. 1997); *Fair*, 885 F.2d at 597 n.5.

8 The ALJ may also consider an unexplained failure to follow treatment
9 recommendations and testimony by the claimant "that appears less than candid."
10 *Tommasetti v. Astrue*, 533 F.3d 1035, 1039 (9th Cir. 2008). As explained by the
11 Commissioner in a policy ruling, the ALJ need not totally reject a claimant's
12 statements; he or she may find the claimant's statements about pain to be credible
13 to a certain degree, but discount statements based on his interpretation of evidence
14 in the record as a whole. SSR 96-7p. The ALJ may find a claimant's abilities are
15 affected by the symptoms alleged, but "find only partially credible the individual's
16 statements as to the extent of the functional limitations." *Id.*

17 Medical opinions based on a claimant's subjective complaints may be
18 rejected where the claimant's credibility has been properly discounted.
19 *Tonapetyan v. Halter*, 242 F.3d 1144, 1149 (9th Cir. 2001). The claimant's
20 credibility is also an appropriate factor weighed in the evaluation. *Webb v.*

1 *Barnhart*, 433 F.3d 683, 688 (9th Cir. 2005). Where an ALJ determines a treating
2 or examining physician's stated opinion is materially inconsistent with the
3 physician's own treatment notes, legitimate grounds exist for considering the
4 purpose for which the doctor's report was obtained and for rejecting the
5 inconsistent, unsupported opinion. *Nguyen v. Chater*, 100 F.3d 1462, 1464 (9th
6 Cir. 1996). Rejection of an examining medical source opinion is specific and
7 legitimate where the medical source's opinion is not supported by his own medical
8 records and/or objective data. *Tommasetti v. Astrue*, 533 F.3d 1035 (9th Cir.
9 2008).

10 Although credibility determinations are the province of the ALJ, and "the
11 court may not engage in second-guessing," *Thomas*, 278 F.3d at 959, the court has
12 imposed on the Commissioner a requirement of specificity. *Connett v. Barnhart*,
13 340 F.3d 871, 873 (9th Cir. 2003); *Dodrill v. Shalala*, 12 F.3d 915, 917 (9th Cir.
14 1993). Even if the record includes evidence to support a credibility determination,
15 the reasons must be articulated with specificity by the ALJ in his decision. The
16 court cannot infer lack of credibility or affirm credibility findings "based on
17 evidence the ALJ did not discuss." *Connett*, 340 F.3d at 874. Further, the
18 reviewing court cannot make independent findings to support the ALJ's decision.
19 *Id.*

1 At the June 16, 2010, hearing, Ms. Wilson testified that the use of her right
2 arm was severely limited due to use causing pain in her shoulder and neck. (Tr.
3 57-62.) Ms. Wilson also described migraines, which occurred three to four times
4 per month lasting two to three days each. (Tr. 63.)

5 The ALJ concluded that Ms. Wilson's arm pain was not supported by
6 objective medical evidence. (Tr. 25.) The ALJ also noted that the claimant visited
7 the emergency room twenty-two times after her surgery, complaining of various
8 injuries and receiving narcotic medications. (Tr. 26.) The ALJ found that given
9 "the claimant's repeated 'accidents,' movement between emergency rooms, and
10 nonspecific pain," the claimant's actions were "strongly indicative of drug seeking
11 behavior." (Tr. 26.) Accordingly, the ALJ found the claimant's pain testimony not
12 credible.

13 The ALJ is correct that the evidence in the record supports a finding that Ms.
14 Wilson's pain decreased during her physical therapy sessions. Three months after
15 her surgery, the claimant reported much lower levels of pain and had greatly
16 recovered her range of motion. (Tr. 547-49.) Accordingly, substantial evidence
17 supports the ALJ's conclusion that Ms. Wilson's subjective complaints about arm
18 pain and the extreme limitations noted in her hearing testimony are simply not
19 supported by objective medical evidence in the record.
20

1 While a lack of objective medical evidence is relevant to an ALJ's
2 credibility determination, it alone is not dispositive. SSR 96-7p. Here, the ALJ's
3 credibility determination is further supported by the indicia of drug-seeking
4 behavior identified by the ALJ. The ALJ accurately described the frequency of the
5 claimant's visits to the emergency room and the nature of her claims. The ALJ
6 also noted the vague symptoms and repeated injuries. The ALJ's opinion about
7 drug-seeking behavior is supported by substantial evidence. As a result, the ALJ's
8 bases for rejecting Ms. Wilson's subjective complaints about pain and limitation
9 are supported by clear and convincing reasons. Therefore, the ALJ did not err by
10 discounting Ms. Wilson's subjective testimony.

11 **Past Relevant Work**

12 Relevant work experience is defined as work that the claimant has "done
13 within the last 15 years, [that] lasted long enough for [the claimant] to learn to do
14 it, and was substantial gainful activity." 20 C.F.R. § 416.965(a). The record
15 shows that Ms. Wilson worked as a janitor for three months in 2005. (Tr. 157.)

16 Employment is presumed to be substantially gainful if the employee meets
17 certain monthly income requirements. According to the Program Operations
18 Manual System ("POMS") of the Social Security Administration, the monthly
19 earning amount giving rise to the presumption of substantiality was \$830.00 in
20 2005 for a nonblind individual. The financial earnings records in this case show

1 that Ms. Wilson earned \$2926.85 in 2005. (Tr. 141.) During that time, Ms.
2 Wilson worked as a janitor for a bank. (Tr. 157.) The record reflects that at most,
3 Ms. Wilson worked for three months in 2005. (Tr. 157.) Accordingly, Ms. Wilson
4 earned an average of approximately \$975.61 per month for the period that she
5 worked. That average exceeds the \$830.00 average required to trigger the
6 presumption of substantiality. The vocational expert testified that the job of
7 janitor, or cleaner/housekeeper as she termed it, had a specific vocational
8 preparation (“SVP”) time of two. (Tr. 74.) According to the POMS, an SVP of
9 two means that the time to learn the position is at least a short demonstration and
10 up to one month. As Ms. Wilson worked as a Janitor for three months, she worked
11 long enough to learn the position. Therefore, Ms. Wilson’s prior work experience
12 as a Janitor qualifies as relevant work experience, and the ALJ made no error in
13 finding that Ms. Wilson was not disabled at step four.

14 **Vocational Hypothetical**

15 Ms. Wilson argues that the ALJ failed to present an appropriate hypothetical
16 to the vocational expert because the ALJ failed to include Ms. Wilson’s alleged
17 severe limitation to her right arm and recurrent migraines. As this Court has
18 upheld the ALJ’s determination that Ms. Wilson’s subjective complaints are not
19 credible, Ms. Wilson’s argument fails.

1 Accordingly, **IT IS HEREBY ORDERED:**

2 1. The claimant's motion for summary judgment, **ECF No. 12**, is **DENIED**.

3 2. Defendant's motion for summary judgment, **ECF No. 18**, is **GRANTED**.

4 3. Judgment shall be entered for Defendant.

5 **IT IS SO ORDERED.**

6 The District Court Clerk is hereby directed to enter this Order, to provide
7 copies to counsel, and to **close** this file.

8 **DATED** this 25th day of September 2013.

9
10 s/ Rosanna Malouf Peterson

11 ROSANNA MALOUF PETERSON
12 Chief United States District Court Clerk
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